Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Applications of America Online, Inc.	)	CS Docket No. 00-30
and Time Warner Inc. for	)	
Transfers of Control	)	

COMMENTS OF THE AMERICAN CABLE ASSOCIATION

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April 25, 2000

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SUMMARY

For the American Cable Association and its member smaller cable businesses, the proposed merger raises two vital public interest questions:

- Will AOL Time Warner require small cable businesses to carry AOL services as a condition of obtaining essential Time Warner and Turner programming?
- Will AOL's substantial investment in DirecTV lead to anticompetitive practices against smaller cable businesses?

An affirmative answer to either question will threaten the viability of smaller cable businesses and will stifle investment in broadband network development in smaller markets and rural areas.

ACA does not oppose the merger at this point. Time Warner and Turner programming affiliates have dealt fairly with smaller cable businesses and their buying group, the National Cable Television Co-op. Still, ACA cannot predict the behavior of the merged entity. Following the merger, AOL will gain control over essential programming services. Smaller cable businesses will have no choice but to transact with AOL Time Warner. No market forces will restrain AOL from dealing harshly with smaller cable businesses.

AOL's "AOL Anywhere" strategy requires aggressive expansion of AOL's customer base. AOL has reiterated its commitment to gaining access to unaffiliated cable systems, including ACA member systems and their three million customers. The parties state that AOL will "actively encourage" access on "commercially reasonable" terms. The question becomes: Commercially reasonable to whom?

Does "AOL Anywhere" mean "AOL or Else" for smaller cable businesses? Does it mean a free ride for AOL services as a condition of access to essential programming? Or worse, will AOL force smaller cable business to carry *and pay for* AOL services? This result would sap capacity, raise costs, and stall infrastructure investment in smaller markets, investment critical to smaller cable's success in narrowing the digital divide.

AOL's strategic investment of $1.5 billion in DirecTV presents an additional and substantial threat of anti-competitive behavior. AOL has a rational incentive to help DirecTV take customers from small cable businesses. After the merger, AOL will have a ready means to do so by forcing carriage of, and payment for, AOL services as a condition of access to essential programming. This strategy would significantly enhance DirecTV's competitive advantage over smaller cable businesses. In light of this threat, ACA supports AOL divesting its interest in DirecTV.

Congress and the Commission have long recognized the public interest in a viable small cable industry. AOL and Time Warner have not yet addressed how the combined entity will deal with smaller cable businesses. The Commission should require the parties to answer satisfactorily the public interest questions posed by ACA.

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COMMENTS OF THE AMERICAN CABLE ASSOCIATION

I. Introduction

AOL and Time Warner state, "Simply put, there is no possibility that this merger could 'frustrate [the Commission's] policies.'"[1] To the members of the American Cable Association, the Commission's analysis is far from simple. To the contrary, for ACA's 300 member independent cable businesses and the three million smaller market and rural cable customers they serve, the proposed merger raises two vital questions implicating national communications policy:

- **Will AOL Time Warner require small cable businesses to carry AOL services as a condition of obtaining essential Time Warner and Turner programming?**
- **Will AOL's substantial investment in DirecTV result in anticompetitive practices against smaller cable businesses?**

An affirmative answer to either question will threaten the viability of smaller cable businesses and stifle investment in broadband network development in smaller markets and rural areas.

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[1] Public Interest Statement of America Online, Inc. and Time Warner Inc., February 11, 2000 ("Public Interest Statement"), at ii.

ACA members share a vital interest in this proceeding. AOL Time Warner will control core programming services essential for ACA members to compete and serve customers in smaller markets and rural areas. ACA members will have no choice but to transact with the combined company. Through the merger, AOL Time Warner will have ultimate leverage over smaller cable businesses. Without AOL Time Warner programming, smaller cable business will fail. This result would conflict with the public interest in a viable small cable industry serving smaller markets and rural areas.

The merger also poses a potential threat to ACA members' success in closing the digital divide in smaller and rural markets. Many ACA members have aggressively deployed advanced services, including digital cable and high-speed Internet access. Undaunted by low-density and higher per-customer costs, ACA members continue to develop innovative solutions for providing advanced services to their customers.

The combined entity will have the power to stop this progress. AOL Time Warner's control of essential programming raises the specter of forced carriage of AOL services. "AOL Anywhere" could mean "AOL or Else" for smaller cable businesses. This would sap capacity, raise costs, disrupt existing partnerships with ISPs and stall infrastructure investment in smaller markets.

AOL's $1.5 billion investment in DirecTV exacerbates the threat. Any competitive disadvantage forced on smaller cable business by AOL will directly benefit DirecTV, ACA members' principal competitor in many areas.

In this proceeding, ACA asks the Commission, AOL and Time Warner to squarely address these important issues involving the public interest in the continuing vitality and viability of smaller cable businesses.

II. The Commission's public interest inquiry should evaluate the merger's potential impact on independent cable businesses.

The parties contend that the merger raises "no risk of anticompetitive conduct" and poses an "utter absence of harm."[2] As pointed out by General Counsel Christopher Wright, the analysis underlying that conclusion is missing at least a few pieces.[3]

Most importantly for ACA, AOL and Time Warner have not yet addressed how the combined entity will deal with smaller cable businesses. Congress and the Commission have long recognized the public interest in a viable small cable industry. It is appropriate then, even required, that the Commission assess the potential adverse impact of the merger on smaller cable businesses.[4]

Ample authority supports consideration in this proceeding of the public interest in maintaining a healthy small cable industry. The 1992 Cable Act and the 1996 Telecommunications Act both contain Congress' express recognition of this public interest through inclusion of specific small cable provisions.[5] Likewise, extensive Commission action has demonstrated the importance to the public interest of

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[2] Public Interest Statement at i and 9.

[3] Letter to Arthur H. Harding and Peter D. Ross from Christopher J. Wright, March 6. 2000.

[4] *L.B. Wilson, Inc. V. FCC*, 397 F.2d 717, 721 (D.C. Cir. 1968) ("The Commission [has] a duty to explore any related matters which might bear upon the public interest, whether urged by the parties or not.")

[5] 47 USC § 543(i) ("In developing and prescribing regulations pursuant to this section, the Commission shall design such regulations to reduce the administrative burdens and cost of compliance for cable systems that have 1,000 or fewer subscribers."); Section 301(c) 1996 Telecommunications Act (providing greater deregulation for small systems), codified at 47 USC § 543(m).

maintaining viable smaller cable companies.[6]

The national concern over the digital divide demonstrates the continuing importance of a thriving small cable industry.[7] ACA members are on the front lines of the push to narrow the digital divide in smaller communities and rural areas. Smaller cable business are showing that removal of burdensome regulation combined with ingenuity, private investment and hard work can create access to advanced services for smaller market consumers. ACA members have not needed government guaranteed loans or multibillion-dollar mergers to make it happen.

Any potential of the proposed merger to chill investment and arrest the expansion of advanced services in smaller markets and rural areas warrants careful consideration in this proceeding.

III. AOL Time Warner could stifle smaller cable's deployment of advanced services and high-speed data by forcing carriage of AOL's services.

The Commission should require AOL and Time Warner to address two potential threats to the public interest posed by the merger:

- The potential of AOL Time Warner to require smaller cable businesses to carry AOL services as a condition of access to affiliated satellite and broadcast programming.

- The potential for AOL to benefit DirecTV by engaging in anticompetitive conduct in dealing with smaller cable businesses.

Both of these potential behaviors by AOL Time Warner would present serious

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[6] For a summary of these efforts in the context of rate regulation, see *Sixth Report and Order and Eleventh Order on Reconsideration* 10 FCC Rcd 7393, at 7401-7402 and 7420(1995); for special small cable leased access rules, see *Second Report and Order and Second Order on Reconsideration*, 12 FCC Rcd 5267 at 5331-5332, 5333 (1997)

[7] See e.g., Statements of William E. Kennard on Telecommunications for all Americans (October 14, 1999), available at <www.fcc.gov/kennard>.

threats to progress by ACA members in the delivery of advanced services, including high speed Internet access, to smaller markets. This result would squarely conflict with the public interest in fairly facilitating small cable's efforts to close the digital divide.

We first provide examples of ACA member success in bringing advanced services to smaller markets. An analysis of the potential threats posed by the merger follows.

A. ACA members are already closing the digital divide in smaller markets and rural areas.

ACA members continue to make significant progress in bringing advanced services to rural America. Through creative solutions to infrastructure upgrades and partnering with ISPs committed to assisting small cable business, ACA members are making it happen. Nearly half of ACA member businesses have already deployed at least one type of high-speed broadband service.

Consider the following success stories:

Mediacom Communications Corporation

In less than five years, Mediacom has emerged as one of the nation's leading independent cable television companies serving approximately 719,000 customers.[8] Mediacom is building its business by serving principally non-metropolitan and rural areas.

Mediacom has rebuilt many of the cable systems it has acquired and will continue substantial investment in network upgrades in 2000 and 2001, all aimed at accelerating the launch of digital cable and cable modem services. Mediacom recently

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[8] *Mediacom Communications Launches High-Speed Internet Access Service in Five New Markets.* (Press release, March 24, 2000), available at <www.mediacomcc.com>.

announced the addition of high-speed Internet access in five markets, making the service available in systems passing a quarter of a million homes.[9] The company expects by December 2000 to have digital cable and high-speed Internet access available in systems passing over 450,000 homes.

For high-speed Internet access services, Mediacom has partnered with the ISP Channel for system design, Internet services and continuing support.[10]

Galaxy Cablevision

Galaxy Cablevision serves approximately 140,000 customers in about 400 communities in 12 states. All of Galaxy's systems serve smaller communities and rural areas. Galaxy is investing heavily in network upgrades and continues deployment of advanced services including high-speed Internet access throughout its service areas.

As an example, Galaxy has constructed a 900-mile fiber optic network in Nebraska that serves 43 communities with an average population of less than 1,000 people. The network passes 63 rural school districts and colleges and seven smaller rural medical centers, providing video and data services to many of them. Because of Galaxy, communities as small as McCool Junction, Nebraska, population 372, have high-speed Internet access.

Galaxy has partnered with the ISP Channel for system design, Internet services and continuing support.[11]

Pine Tree Cablevision

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[9] *Id.*

[10] *Softnet and Mediacom Sign Exclusive 10-year Agreement to Add Over One Million Homes Passed to ISP Channel*. (Press release, July 7, 1999), available at <www/softnet.com/coinfo/press/ 00_07_07.html>.

[11] *See* <www.galaxycable.com/ISP/isp_page.html>.

Pine Tree Cablevision serves about 14,000 customers over 23 systems in Maine, New Hampshire and South Carolina. Pine Tree provides another example of a smaller cable business investing to narrow the digital divide in its communities.

Pine Tree first introduced digital cable services to its Maine customers in December 1997 and high-speed Internet access in September 1998. Today, 80% of its Maine customers have digital cable and high-speed Internet access available, and Pine Tree anticipates availability of those services to 100% of its Maine customers during 2001. Pine Tree plans to replicate those service offerings in New Hampshire and South Carolina. Using fiber/coax system architecture, Pine Tree can make these services available.

Pine Tree has partnered with the ISP Channel for system design, Internet services and continuing support.

Rural Route Video

When shielded from burdensome regulation and unfair terms of program access, even the smallest cable television systems can deliver advanced services. An example: Rural Route Video serves about 420 customers in Southern Colorado, including customers on the Southern Ute reservation. A year ago, Rural Route Video introduced high-speed data services. With 30 data customers, Rural Route Video has found it economically viable to offer high-speed Internet services.

Rural Route Video has partnered with InterTECH for system design, ISP services and continuing support.[12]

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[12] *See* InterTECH Announces Deals with Five Small Ops, available at <www.catv.org/bbb-report/1999/arch-0416.html>.

As these examples highlight, ACA's members are actively deploying advanced services to smaller communities and rural America. For these services to continue to flourish and close the digital divide, the Commission must protect smaller cable businesses from anticompetitive conduct and unbridled abuse of market power by the combined AOL Time Warner.

Contrast these success stories with the parties' argument that the merger is necessary for "synergies . . . to hasten the deployment of broadband, interactive networks and thereby make substantial progress in closing the digital divide."[13] The Commission should recognize and protect the successes of ACA members in advancing the substantial public interest in narrowing the digital divide - without the necessity and public interest risks of a massive merger.

B. The merger poses a serious threat to the public interest if AOL Time Warner conditions access to essential programming on carriage of AOL's services.

The principal threat facing ACA members in this merger is the potential that AOL Time Warner will require carriage of AOL services as a condition of access to core programming. ACA cannot assume that pre-merger Turner and Time Warner programming affiliates will remain good actors after absorption into AOL Time Warner. The results of the merger remain unpredictable. Moreover, the "AOL Anywhere" strategy and AOL's rollout of AOLTV, combined with AOL's substantial investment in DirecTV, all suggest incentives to deal harshly with smaller cable businesses once AOL gains control of essential satellite and broadcast programming.

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[13] Public Interest Statement at 13.

1. AOL Time Warner will gain control over core satellite and broadcast programming essential to smaller cable systems.

AOL Time Warner will control satellite and broadcast programming essential to smaller cable system's core channel line-ups.[14] These services include:

- Home Box Office - the premier movie channel.
- CNN News Group - including CNN and CNN Headline News, the most popular 24 hour news channels, and related channels including CNN*fn*, CNN/SI, CNN en Espanõl, and CNN International.
- WTBS Superstation - the most popular superstation.
- Turner Network Television - a very popular basic service.
- Turner Classic Movies - another popular basic service.
- The Cartoon Network - the most popular children's network.
- WB Television Network - a popular broadcast network offered by at least 150 affiliates nationwide.[15]

All of these services represent core services, essential for smaller cable's ability to serve customers and compete, especially against AOL-backed DirecTV. If smaller cable companies cannot obtain these services on reasonable terms and conditions, they cannot maintain the customer bases necessary for economic viability.

[14] Supplemental Information of America Online, Inc. and Time Warner, Inc., March 21, 2000 ("Supplement") at 7-8; Public Interest Statement at 4.

[15] Warren Publishing, Inc.,Television and Cable Factbook; Services Volume No. 68, 2000 Edition, at G-69.

2. AOL implies that it will use leverage gained in the merger to force access on unaffiliated smaller cable systems.

The proposed combination will add AOL's current and future online services to Time Warner's programming services. The parties evoke the prospect of "boundless opportunities for new consumer services" as a result.[16]

The question then becomes: How will AOL Time Warner market these services to subscribers? The answer that will threaten the viability of smaller cable business is this: <u>AOL will seek access to ACA member's 3 million customers by requiring carriage of AOL services as a condition of obtaining Time Warner core programming</u>.

Several statements on the record suggest that if left unchecked, a strong likelihood exists that "<u>AOL Anywhere</u>" could mean "<u>AOL or Else</u>" for smaller cable businesses.

AOL acknowledges that to succeed it needs more customers, and it intends to find them on unaffiliated cable systems.

> A key focus of this strategy—and, indeed, of AOL's overall business strategy—is the ability to reach as many consumers as possible, in as many ways as possible. Subscriber revenues, obviously, are a function of the number of customers. Similarly, advertising revenues are linked to the number of "eyeballs" that advertisers' messages will reach. And e-commerce revenues are derived on a per-transaction basis. Thus, for a whole host of reasons, the economic model upon which AOL's corporate success is based depends upon widespread distribution of the AOL service.[17]

To advance this strategy, the parties "intend to <u>encourage actively</u> other cable

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[16] Supplement at 33.

[17] Supplement at 16.

operators" to agree to AOL's request for access.[18]

The parties make clear their expectation of access to other delivery platforms, including unaffiliated cable systems, on "a commercially reasonable basis" and through "marketplace forces".[19] These statements beg key questions: Commercially reasonable for whom? Just how does AOL intend to "actively encourage" smaller cable companies? The Commission should require AOL to answer these questions.

The incentive for smaller cable businesses and ISP partners to risk the development of broadband networks in rural areas evaporates when AOL can demand a free ride as "consideration" for the carriage of HBO and CNN. Or worse, AOL could force carriage of AOL services, and require payment for the “privilege." AOL's development of AOLTV poses an additional incentive to force carriage of AOL's services on smaller cable's systems.[20]

ACA’s fears do not arise in a vacuum. Commentators have reported AOL’s use of “hard ball tactics to . . . eliminate competition”[21] and “charg[ing] exorbitant fees” for using AOL’s services.[22] AOL’s "modis operandi" reportedly includes repeated use of “anti-competitive and strong-arm business practices.”[23] These reports should sharpen the Commission’s scrutiny of AOL’s post-merger plans for smaller cable businesses.

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[18] American Online, Inc. and Time Warner Inc. Memorandum of Understanding, February 29, 2000 (emphasis added).

[19] Supplement at 12.

[20] Supplement at 33,34.

[21] *The AOLization of America: The AOL Way or No Way* (April 19, 2000), available at <www.cnet.com/techtrends/o-1544320-7-1-1708289.html?tag=st.sr.1544320-7-1708292.subdir.1544320-7-1708289.

[22] *Id.*

[23] *Id.*

3. AOL's $1.5 billion investment in DirecTV provides added incentive to undermine smaller cable businesses' ability to compete.

AOL acknowledges a strategic investment of $1.5 billion in ACA members' principal competitor DirecTV. AOL's goal is to enhance DirecTV's ability to market AOL services, including AOLTV.[24] This investment, combined with AOL's post-merger control over essential programming, presents a substantial threat of anticompetitive behavior.

AOL acknowledges that the success of its "AOL Anywhere" strategy relies on gaining access to more consumers. AOL, through its investment in DirecTV, has a rational incentive to help DirecTV take customers from small cable businesses. After the merger, AOL will have a ready means to do so, by forcing carriage of, and even payment for, AOL services as a condition of smaller cable's access to essential programming. This strategy would sap channel capacity, raise costs and prices, disrupt smaller cable's rollout of high-speed Internet services, and significantly enhance DirecTV's competitive advantage over smaller cable businesses.

AOL contends that its DirecTV investment is not attributable, so the Commission should disregard it. This argument should not deflect Commission scrutiny of anticompetitive conduct contrary to the public interest. Attribution standards aside, AOL has a substantial incentive to influence DirectTV and to use its post-merger leverage to grow DirecTV's customer base at the expense of smaller cable businesses.

In light of this threat and AOL's reported reputation of using "hardball tactics to

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[24] Public Interest Statement at 3; Supplement at 10.

eliminate competition," ACA supports AOL divesting its interest in DirecTV.

IV. Conclusion.

ACA agrees that the AOL Time Warner merger presents many exciting possibilities for consumers, including the customers served by smaller cable businesses. At the same time, the leverage gained by AOL over essential programming services, combined with AOL's strategy of gaining access to smaller cable systems, raises a serious threat that the combined entity conditioning access to programming on the carriage of AOL services. This conduct would threaten the viability of smaller cable business and would stall the investment necessary to continue smaller cable's successes in narrowing the digital divide.

AOL's $1.5 billion investment in DirecTV creates additional potential for anticompetitive behavior adverse to small cable. AOL should remove any doubt and divest this interest.

ACA requests the Commission require the parties to squarely answer the key public interest questions raised in these Comments.

Respectfully submitted,

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